No. 73-1193

MICHAEL RODAK,

In the Supreme Court of the United States

OCTOBER TERM, 1973

CHARLES RAY CONSIDINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a bench trial in the United States District Court for the Southern District of California, petitioner was convicted on four counts of having willfully made and subscribed income tax returns, under the penalties of perjury, which he did not believe to be true and correct as to every material matter, in violation of Section 7206(1) of the Internal Revenue Code of 1954, 26 U.S.C. 7206(1). He was sentenced to concurrent terms of eighteen months' imprisonment. The court of appeals affirmed (Pet. App. A-11 to A-14). Petitioner's primary contention is that the proof was insufficient to establish willfulness.

Petitioner is a practicing certified public accountant who has substantial experience in federal income tax matters (Pet. App. A-12). The evidence at trial showed

that he had understated his taxable income for the years 1965, 1966, 1967, and 1969 as follows: (a) for 1965, petitioner understated his interest income by $57,131; (b) for 1966, petitioner understated his interest income by $9,975 and overstated his charitable contributions by $8,877; for 1967, petitioner overstated his charitable contributions by $3,028; and for 1969, petitioner understated his long-term capital gains by $98,358 (Pet. App. A-7 to A-9). The trial judge specifically found that petitioner knew that his returns were false at the time he made and subscribed them (Pet. App. A-9 to A-10).

1. Petitioner's principal defense at trial was that his returns were in fact correct, and in making this argument he purported to rely upon several prior decisions of this and other courts. But the trial judge, after hearing legal argument and petitioner's testimony concerning his state of mind at the time he made and subscribed his returns, determined both that petitioner's returns were incorrect and that petitioner had known they were incorrect when they were made and subscribed. Petitioner now acknowledges (Pet. 15) that his returns were incorrect as a civil tax matter, but he nevertheless contends (Pet. 10-16, 21) that there was sufficient ambiguity in the case law that his inaccurate representations could not have been willful.

This contention is without merit. The trial judge, applying the "reasonable doubt" standard, determined that petitioner had not been relying in good faith on decisional law when he prepared his returns but instead had deliberately and knowingly understated his taxable income. That factual determination is fully consistent with this Court's holding in *United States* v. *Bishop*, 412 U.S. 346, 360, that the word "willfully" in the criminal tax statutes "connotes a voluntary, intentional violation of a known legal duty."

In arguing, in effect, that the district court was barred from making a finding of willfulness, petitioner relies upon *James* v. *United States*, 366 U.S. 213. In *James*, this Court overruled *Commissioner* v. *Wilcox*, 327 U.S. 404, and held that embezzled money constitutes income to the embezzler; but in doing so, the Court reversed the tax evasion conviction of an embezzler who had failed to report his embezzlement income, on the ground that (366 U.S. at 221-222) "the element of willfulness could not be proven * * * so long as the statute contained the gloss placed upon it by *Wilcox* at the time the alleged crime was committed."[1] But this case is not *James;* none of the decisions cited by petitioner (Pet. 12-14, nn. 3-4) supports his treatment of the interest, charitable contribution, and capital gain items on his returns. There was no gloss placed upon the statute which could excuse petitioner's deliberate and informed choice to understate his income.

2. Petitioner contends (Pet. 17-18) that there was a fatal variance between the indictment and the proof at trial, in that the indictment charged that he claimed a deduction for charitable contributions of $20,781 in 1966 when "he knew and believed he was not entitled to said deduction in any amount," whereas the proof showed that the deduction was overstated only by $8,877. This variance did not deprive petitioner of due process.

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[1]This language was joined in by only three members of the Court (Warren, Brennan, and Stewart); three other Justices who voted to overrule *Wilcox* (Frankfurter, Clark, and Harlan) dissented from the reversal of the conviction. However, two Justices (Black and Douglas) who voted against overruling *Wilcox* additionally observed that reversal of the conviction was "good governmental policy" (366 U.S. at 224) in view of the contrary disposition of the substantive tax issue.

See, *e.g.*, *United States* v. *Ragen*, 314 U.S. 513, 526.[2] There is no conflict with *Stirone* v. *United States*, 361 U.S. 212, where the indictment charged unlawful interference with the importation of sand and the proof showed unlawful interference with the exportation of steel, thus obviously confronting the defendant with prejudicial surprise.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.

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[2]Nor is there any basis for petitioner's contention (Pet. 19-20) that this variance rendered his jury-trial waiver ineffective. The government, prior to trial, had challenged the validity of two charitable deductions. The "variance" resulted when the government was able to prove only that one of the deductions was bogus. We do not see how petitioner's successful defense of one of his deductions can possibly render his waiver ineffective. That waiver was made voluntarily and upon the advice of counsel and in no way conflicts "with the principles enunciated in *Adams* v. *United States ex rel. McCann*, 317 U.S. 269" (Pet. 20).

[3]*Garner* v. *Louisiana*, 368 U.S. 157, upon which petitioner also relies, merely involved the reversal of a conviction for complete failure of proof. The variance here did not amount to a failure of proof of guilt.